UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

SOUTHERN FOREST WATCH, INC., et al.,	)	
Plaintiffs,	)	
v.	)	CIV. NO. 3:13-cv-116 (HOOD/GUYTON)
SECRETARY OF THE INTERIOR, SALLY JEWELL, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The United States of America, on behalf of federal defendants Sally Jewell, Secretary of the Interior, Jonathan B. Jarvis, Director of the National Park Service, Dale A. Ditmanson, Superintendent of the Great Smoky Mountains National Park, and Patricia Wissinger, Assistant Superintendent of the Great Smoky Mountains National Park,[1] all of whom are named as defendants in their official capacities, (Defendants), by and through William C. Killian, United States Attorney for the Eastern District of Tennessee, pursuant to Rule 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, and E.D. TN. LR 7.1, files this memorandum in support of the government's Motion to Dismiss.

[1] Sally Jewell has replaced Kenneth Lee Salazar as Secretary of Interior, and Alan Sumerski has been succeeded by Patricia Wissinger. Accordingly, pursuant to Federal Rule of Civil Procedure 25(d), Assistant Superintendent Wissinger and Secretary Jewell are automatically substituted for former Acting Deputy Superintendent Sumerski and Secretary Salazar.

FACTS

This lawsuit is about Plaintiffs' ardent opposition to two decisions of the National Park Service (NPS): (1) a decision to charge a $4.00 backcountry camping fee and (2) a decision to implement an online backcountry reservation system.

On December 8, 2004, Congress enacted the Federal Lands Recreation Enhancement Act (FLREA),1 16 U.S.C. §§ 6801-6814, which authorizes the United States Department of Agriculture, Forest Service, and four United States Department of the Interior agencies (the Bureau of Land Management, Bureau of Reclamation, National Park Service (NPS), and U.S. Fish and Wildlife Service) to implement recreation fees and retain the fee revenues to supplement appropriations and other funding sources to repair, improve, operate, and maintain recreation sites and areas to quality standards (including reduction of recreation deferred maintenance), and to enhance delivery of recreation services to quality standards. 16 U.S.C. §§ 6806(c)(1)(A), 6807(a). As Plaintiffs allege, the NPS has approved a "$4.00 per-person, per night" fee for Backcountry Camping/Shelters. *See* Compl. ¶ 81.

The Plaintiffs filed suit on March 2, 2013. The Complaint alleges subject matter jurisdiction under 28 USC §1331. Compl. ¶ 1. The Complaint seeks declaratory judgment allegedly authorized by 28 USC §§ 2201 and 2202, and either preliminary or permanent injunctive relief. Plaintiffs' allegations concerning their standing to file suit are that Southern Forest Watch, Inc., is "a Tennessee Public Benefit Corporation under the laws of Tennessee with a principal place of business in Knox County, Tennessee," and that Plaintiffs Quillen, Cameron and Bostick "are citizens and residents of the State of Tennessee." Compl. ¶¶ 9-10. They further allege that "Southern Forest Watch's members and individual plaintiffs have been free to hike and camp in the backcountry areas of the Smoky Mountains under a volunteer registration system and with no charge." Compl. ¶ 17. Plaintiffs generally describe the controversy in this

case as "concerning the validity of various regulations and actions in adopting a reservation system in order to charge fees and levy a tax for backpacking in the Great Smoky Mountains National Park." Compl. ¶ 5.

The gravamen of Plaintiffs' Complaint is that, in implementing a backcountry camping fee pursuant to the FLREA, Defendants' administrative process was "corrupt and devious" with an "end goal to control and limit use of the backcountry areas of the Smoky Mountains." Compl. ¶ 21. Plaintiffs set forth nine counts in the Complaint, and, in eight counts, state a purported cause of action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, (*see* Counts I-VI, VIII-VI). In Count I, Plaintiffs claim they are entitled to a declaration that Defendants made deliberate and knowing misrepresentations about backpacker "tax" proceeds. Compl. ¶ 89. Count II seeks a declaration that Defendants' alleged grant to private entities of "exclusive license and rights to natural curiosities, wonders and objects of interest" in the Smoky Mountains violates 16 U.S.C. § 3. In Count III, Plaintiffs assert that there is no legal basis for "charging any fees whatsoever inside the Smoky Mountains on 'any part thereof,' including in the backcountry," and seek a declaration so stating. Compl. ¶ 96. In Count IV, Plaintiffs further seek a determination that they are "free to backpack in areas beyond areas designated for collection of the backpacker tax." Compl. ¶ 99. In Count V, Plaintiffs ask the Court to decide that Defendants did not comply with the statutory requirements of FLREA and 16 U.S.C. § 1, *et seq*, in establishing a new backpacker fee and reservation system. Compl. ¶¶ 106-107. Count VI requests a ruling that certain "authority," which Plaintiffs attribute to an agency memorandum, was exceeded by Defendants in the implementation of a new backpacker fee and reservation system. Compl. ¶ 110. Count VII seeks a determination that the agency decision to implement an online reservation system and "backpacker tax" was arbitrary and capricious, in violation of 5 U.S.C. § 706. Compl. ¶¶ 112 -114. In Count VIII, Plaintiffs ask the court to find that

Defendants conducted "sham and meaningless public meetings" before implementing the backcountry fee. Compl. ¶ 120. Finally, in Count IX, Plaintiffs ask the Court to adjudge agency "adjudication is arbitrary, capricious, an abuse of discretion and not according to law." Compl. ¶ 124. Based on the reasons set forth below, the United States asks the Court to dismiss all Counts and the Complaint with prejudice.

ARGUMENT

Standard of Review: Rules 12(b)(1) and 12(b)(6)

In *Taylor v. United States*, No. 1:10-cv-204, 2011 WL 2181888, at *2 (E.D. Tenn. June 3, 2011), the court clearly set forth the standard of review applied to motions brought under Fed. R. Civ. P. 12(b)(1) and (6):

> Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) is proper when a federal court lacks subject-matter jurisdiction. When subject matter jurisdiction is challenged, the party asserting jurisdiction (in this case, the plaintiff), bears the burden of establishing jurisdiction to survive a motion to dismiss. *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266, 269 (6th Cir. 1990). If the plaintiff fails to meet his burden, the motion to dismiss must be granted. *Moir*, 895 F.2d at 269. When considering a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, a court is permitted to review other evidence to resolve factual disputes. *See Rogers v. Stratton Industries, Inc.*, 789 F.2d 913, 918 (6th Cir. 1986) (discussing that courts Amay resort to written or live evidence submitted in connection@with a Rule 12(b)(1) motion). "Moreover, on the question of subject matter jurisdiction the court is not limited to jurisdictional allegations of the complaint but may properly consider whatever evidence is submitted for the limited purpose of ascertaining whether subject matter jurisdiction exists." *Pryor Oil Co., Inc. v. United States*, 299 F. Supp. 2d 804, 807-08 (E.D. Tenn. 2003) (citing *Rogers*, 798 F.2d at 915-16 (other citations omitted).
>
> Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is proper when a pleading or a portion of a pleading fails to state a claim upon which relief can be granted. When considering a Rule 12(b)(6) motion for dismissal, the Court construes the complaint in the light most favorable to the Plaintiff and accepts all well-pleaded allegations of fact in the complaint as being true. *Erickson v. Pardus*, 551 U.S. 89 (2007). When a factual allegation is capable of more than one reasonable inference, it must be construed in Plaintiff's favor. *Saglioccolo v. Eagle Ins. Co.*, 112 F.3d 226, 228 (6th Cir. 1997). The Court may not dismiss a complaint merely because the Court does not believe the allegations of fact set

forth in the complaint. *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997).

A. Plaintiffs have not established Article III standing, and, thus, their claims are not justiciable.

Article III of the Constitution limits the powers of the federal judiciary to "Cases" and "Controversies." "That a litigant must establish standing is a fundamental element in determining federal jurisdiction over a 'case' or 'controversy' as set forth in Article III of the Constitution." *See Morrison v. Bd. of Educ.*, 521 F.3d 602,608 (6th Cir. 2008) (citing, *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). Standing is a threshold question to be resolved by the court before the court may address any substantive issues. *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F. 2d 1390, 1394 (6th Cir. 1987); *see also DaimlerChrsler Corp. v. Cuno*, 547 U.S. 332, 340 (2006). In order for a plaintiff to have standing, a plaintiff must establish that: (1) there has been an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) any alleged harm must be redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Furthermore, under the first requirement for standing, the harm must be "concrete and particularized" and must be "actual or imminent" rather than "conjectural or hypothetical." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Plaintiffs, as the parties invoking federal subject matter jurisdiction have the burden of persuasion that the standing requirements have been met. *Dismas Charities, Inc. v. United States*, 401 F.3d 666, 671 (6th Cir. 2005) (citing *Lujan*, 504 U.S. at 561).

Here, Plaintiffs' Complaint fails to allege facts that meet the requirements for actual or imminent injury. Plaintiffs claim that they "have been free to hike and camp in the backcountry areas of the Smoky Mountains under a volunteer registration system and with no charge." Compl. ¶ 17. They assert that the pre-existing backcountry permit system has worked for the

past eighty years and "the Smoky Mountains were free to all and use of the backcountry was unimpaired." Compl. ¶ 18. Plaintiffs reiterate that "Southern Forest Watch's members and individual plaintiffs have been free to hike and camp in the backcountry areas of the Smoky Mountains under a volunteer registration system and with no charge." Compl. ¶ 37. Plaintiffs further allege that the Defendants have attempted to control and limit use of the backcountry areas of the Great Smoky Mountains, specifically stating that "the defendants determined to limit, control and impair access to the backcountry sections" (Compl. ¶ 19); that "defendants implemented a corrupt and devious administrative process with the end goal to control and limit use of the backcountry areas of the Smoky Mountains" (Compl. ¶ 21); and that "defendants have implemented a backcountry reservation system . . . to restrict and impair use of the Smoky Mountain backcountry" (Compl. ¶ 22). These allegations, however, which are nothing more than vague opinions and generalizations, fail to connect to any specific interest of any specific Plaintiff in a manner that evidences harm or injury.[2]

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[2] Fed. R. Civ. P. 8 requires that pleadings contain "short and plain statements" regarding the parties' grounds for establishing jurisdiction, claims for relief, and demands. Fed. R. Civ. P. 8(a). Moreover, "Allegations are to be simple, concise and direct." Fed. R. Civ. P. 8(d)(1).

In the instant case, Plaintiffs' Complaint consists of 124 paragraphs (31 pages), containing several convoluted allegations, lengthy statutory quotes, lengthy excerpts from an historical book, conclusory statements, unwarranted personal attacks, and unclear causes of action.

> As this Court stated in *Ward v. Lincoln County Jail*:
> *A district court has the power to dismiss a complaint when a plaintiff fails to comply with the Federal Rules of Civil Procedure, including Rule 8(a)(2)'s "short and plain statement" requirement. Vakalis v. Shawmut Corp.*, 925 F.2d 34, 36 (1st Cir.1991); *Mangan v. Weinberger*, 848 F.2d 909, 911 (8th Cir.1988). *See* Fed. R. Civ. P. 41(b). While a party is entitled to state his claims and arguments, he must observe a reasonable degree of brevity.

Ward, No. 07-CV-389-JMH, 2007 WL 4259558, at *1-2 (E.D. Ky. Nov. 29, 2007) (Hood, J.) (emphasis added). Pleadings should not "needlessly speculate, accuse and condemn." *Bernard v. Beckstrom*, No. 07-CV-19, 2007 WL 1558525, at *3 (E.D. Ky. May 29, 2007) (Hood, J.) (quoting *Barsella v. United States*, 135 F.R.D. 64, 66 (S.D.N.Y.1991).

In addition, the Plaintiffs have not alleged factual harm by the implementation of the backcountry fee system, which is the subject of the Complaint. Plaintiffs spend several paragraphs describing the pre-existing backcountry system. Compl. ¶¶ 37-38, 44-48. In Paragraphs 77 through 85 of the Complaint, Plaintiffs describe the new Backcountry Permit System. In Paragraphs 78 and 80, the Plaintiffs allege that users of the new system have to click through five different web pages and that reservations utilizing the new system have to be made within fifteen minutes of starting the entire reservation process. Plaintiffs conclude that "[t]he new reservation system and backpacker tax is the epitome of impairment of the use and enjoyment of the Smoky Mountains. Compl. ¶ 86. However, these statements are insufficient to show harm. None of these paragraphs particularize how the backcountry fee system causes harm to a named Plaintiff. Plaintiffs complain that there is a $4.00 per person, per night charge, and "that there has never been a charge for backcountry camping in the Smoky Mountains' entire eight decades of existence." Compl. ¶ 81. Nevertheless, Plaintiffs have not alleged a harm caused by the fee that has directly affected them. At bottom, Plaintiffs have only alleged inconveniences and policies with which they disagree, and they have failed to state an actual or imminent harm to a named Plaintiff that has resulted from the new backcountry permit system.

Moreover, with respect to Counts VII and IX, which purport to address claims under the Administrative Procedure Act (APA) 5 U.S.C. § 701 et seq., Plaintiffs must further establish prudential standing. *See Dismas Charities, Inc.*, 401 F.3d at 671; *Town of Smyrna v. United States Army Corps. of Eng'rs.*, 517 F. Supp. 2d 1026, 1039 (M. D. Tenn. 2007). The prudential component requires the plaintiff to demonstrate that the plaintiff "arguably falls within the zone of interests intended to be protected or regulated by the statute." *Bennett*, 520 U.S. at 175-76. In addition, courts have developed a set of prudential considerations to limit standing in federal court to prevent a plaintiff "from adjudicating 'abstract questions of wide public significance'

which amount to 'generalized grievances' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 at 474-75 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). Thus, a plaintiff's best evidence for determining that the plaintiff falls within the zone of interest is that there is a direct statute that indicates the plaintiff is to be protected.

To have standing to challenge the imposition of a fee under FLREA, Plaintiffs must show that they are within the zone of interest protected by the statute. On its face, however, the purpose of the statute is not the protection of individual citizens, but the provision of certain fee income for federal land management agencies. The purpose of 16 U.S.C. § 6805 (c) "is to improve recreational facilities and visitor opportunities on federal recreational lands by reinvesting receipts from fair and consistent recreational fees and passes." *See Sherer v. United States Forest Serv.*, 727 F. Supp. 2d 1080, 1083 (D. Conn. 2010). Plaintiffs' allegations regarding the factors on which the NPS made its fee decision cannot be considered by this Court until the Plaintiffs demonstrate that they are within the zone of interest of the statute and can establish prudential standing. Plaintiffs' Complaint regarding the reservation system with a $4.00 fee constitutes nothing more than a generalized grievance, which applies no differently to Plaintiffs than to others in the general public. "Whether a plaintiff's interest is 'arguably . . . protected . . . by the statute' within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . ., but by reference to the particular provision of law *upon which the plaintiff relies*." *Bennett*, 520 U.S. at 175-76 (emphasis added). Plaintiffs have failed to identify a statutory basis on which the Court can find that their interest meets the "zone of interest" test.

Plaintiffs' Complaint has failed to articulate an actual or imminent harm, and thus, there is a lack of constitutional standing. Additionally, Plaintiffs' Complaint fails to show that they fall within the zone of interests of the FLREA, as required to establish prudential standing; therefore, the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b) (1).

B. Sovereign immunity bars Plaintiffs' challenge to NPS' decisions relating to the online reservation system and "corresponding new rules and regulations."

The APA contains a waiver of sovereign immunity, but the waiver is limited.[3] At 5 U.S.C. § 702, the APA states that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

This waiver, however, is limited by 5 U.S.C. § 701, which states:

> § 701. Application; definitions
> (a) This chapter applies, according to the provisions thereof, --
>
> (1) statutes preclude judicial review; or
>
> (2) *agency action is committed to agency discretion by law.*

(Emphasis added.)

Courts have held that the APA's waiver of sovereign immunity is limited by section 701(a) (2).[4] When looking at a challenge to an action taken by an agency, courts look to the

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[3] The APA serves as a limited waiver of sovereign immunity, not a grant of subject matter jurisdiction. *Califano v. Sanders*, 430 U.S. 99 (1977); *City of Albuquerque v. United States Dep't. of the Interior*, 379 F.3d 901, 906-907 (10th Cir. 2004); *New Mexico v. Regan*, 745 F.2d 1318, 1321 (10th Cir. 1984).

[4] In *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987), the Supreme Court said, ". . . it is the Administrative Procedure Act (APA) that codifies the nature and attributes of judicial review [of agency action], including the traditional principle of its unavailability "to the extent that . . . agency action is committed to agency discretion by law." 5 U. S. C. § 701(a)(2). We have recently had occasion to apply this limitation to the

statute under which the action was taken, and, when the statute is drawn granting such broad discretion as to provide no law to apply, there is strong indication that the "committed to agency discretion" exception in the APA is intended to apply. *Gatter v Nimmo*, 672 F.2d 343, 345 (3rd Cir. 1982). Accordingly, absent a mandatory duty requiring the agency to take a specific non-discretionary act, the waiver of sovereign immunity afforded under the APA does not apply, and the district court lacks jurisdiction. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004); *see also Ohio Public Interest Research Group, Inc. v. Whitman*, 386 F.3d 792, 797-99 (6th Cir. 2004) (stating that "where the statute provides no meaningful standard against which a court can judge an agency's action, such action is unreviewable"); *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1124-25 (6th Cir. 1996) (same).

In Count VII, Plaintiffs state that "[t]he challenged final agency action in these proceedings is the implementation of an online reservation system and corresponding backpacker tax inside the Smoky Mountains along with the corresponding new rules and regulations." Compl. ¶ 112. In Count IX, Plaintiffs acknowledge that the NPS was exercising discretion when it made the challenged decisions, but Plaintiffs contend that section 706(2)(A) authorizes them to contest the decisions on the grounds that "[t]he entire adjudicatory process[5] was flawed and skewed from the beginning and throughout, and there was a clear error of judgment"[6] Compl. ¶ 112.

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general grant of jurisdiction contained in 28 U.S.C. § 1331, see *Heckler* v. *Chaney*, 470 U.S. 821 (1985). . . ."

[5] The decision-making process which the Park engaged in was not an "adjudicatory" process. *See* 5 U.S.C. § 551(7) ("adjudication" means agency process for the formulation of an order").

[6] In *Interstate Commerce Comm'n*, the Supreme Court held that allegations that an agency has given "reviewable" reasons *for an otherwise unreviewable action*, does not make the action "reviewable" under the APA. 482 U.S. at 282 (emphasis added).

In Counts VII and IX, which purportedly state Plaintiffs' APA claims, Plaintiffs are, in actuality, challenging three decisions by the NPS, not one. The Plaintiffs are challenging the Park's decision to: (1) require reservations for all backcountry camping and to implement an online reservation system; (2) charge a fee for backcountry camping; and (3) initiate "new" rules and regulations associated with the backcountry camping and reservation requirement. Only one of these decisions, the decision to charge the fee, was made under the authority of FLREA. The other two are decisions entirely within the discretion of the Park Superintendent.

The statutes establishing the NPS authorize the Secretary to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." 16 U.S.C. § 3. This authority has been implemented by regulations and by a special set of rules for each park known as a "Superintendent's Compendium." The main body of NPS regulations is found at 36 C.F.R. Parts 1 – 7.[7]

The regulations use discretionary language that puts many decisions and actions of NPS officials and Park staff beyond the purview of APA review. For instance, the regulations afford discretion to Park management by stating that the Park Superintendent "may" impose public use limits for portions of a park and designate areas of a park for a specific use or activity, or impose conditions or restrictions on a use or activity. 36 C.F.R. § 1.5(a). Moreover, in order to implement a certain public use, a Park Superintendent is authorized to "establish a permit,

[7] 36 CFR 1.1 states: Purpose. (a) The regulations in this chapter provide for the proper use, management, government, and protection of persons, property, and natural and cultural resources within areas under the jurisdiction of the National Park Service. (b) These regulations will be utilized to fulfill the statutory purposes of units of the National Park System: to conserve scenery, natural and historic objects, and wildlife, and to provide for the enjoyment of those resources in a manner that will leave them unimpaired for the enjoyment of future generations.

registration, or reservation system." 36 C.F.R. § 1.5(d). Further, "the superintendent 'may' issue a permit to authorize an otherwise prohibited or restricted activity or impose a public use limit." 36 C.F.R. § 1.6(a). The regulation also provides that "[t]he superintendent shall include in a permit the terms and conditions that the superintendent 'deems' necessary to protect park resources or public safety and may also include terms or conditions established pursuant to the authority of any other section of this chapter." 36 C.F.R. § 1.6(e). Specifically addressing camping, the regulations at 36 C.F.R. § 2.10(a) state that "[t]he superintendent may require permits, designate sites or areas, and establish conditions for camping." The regulation also lists things or activities that are prohibited when camping, including "[f]ailing to obtain a permit" and "[c]amping outside of designated sites or areas." 36 C.F.R. § 2.10(b)(10). And, not surprisingly, a Park Superintendent is authorized to regulate the use of fires within a park. 36 C.F.R. § 2.13.

The decisions to require a reservation for all backcountry camping and to regulate backcountry camping by imposing certain rules, which Plaintiffs describe as "new,"[8] are decisions within the discretion of the Park Superintendent to make, and, thus, the Complaint does not state a claim upon which relief can be granted under the APA. Unlike the decision to charge the fee under FLREA, the statutes and regulations under which these decisions were made were intended to give the Park Superintendent broad management discretion. There is "no law to apply." The Plaintiffs want the Court to step into the shoes of the Park Superintendent and render a decision consistent with their own personal interests and desires. However, 5 U.S.C. §

[8] There have been rules that regulate backcountry camping for almost as long as the Park has existed; the only "new" rules require a reservation for all backcountry camping. It appears that the Plaintiffs may be challenging the Park's authority to put in place any rules regulating backcountry camping. Because the statute and the regulations cited [continued] above give the Secretary and the Park Superintendent the discretion to impose rules and conditions in all areas of a park, Plaintiffs' challenge must fail.

701(a)(2), bars a court from applying the standards set forth in 5 U.S.C. § 706 if the challenged agency action is "committed to agency discretion by law."

In this case, subject matter jurisdiction is lacking because there is no waiver of sovereign immunity for discretionary agency actions. Pursuant to Fed. R. Civ. P. 12(b)(1), Defendants move to dismiss Counts VII and IX, and any other claims within the Complaint regarding the backcountry camping online reservation system and associated rules and regulations for which Plaintiffs attempt to secure APA review.

C. The Declaratory Judgment Act does not provide Plaintiffs with an independent cause of action.

Counts I through VI, VIII, and IX of Plaintiffs' Complaint, by their own terms, purport to assert claims pursuant to the Declaratory Judgment Act (DJA), 28 U.S.C. § 2201. *See* Compl. ¶¶ 22-30. The Court must dismiss these counts because the DJA does not provide Plaintiffs with an independent cause of action. Rather, the DJA is a procedural statute that provides a form of relief previously unavailable, and cannot be an independent source of subject matter jurisdiction. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). The Court, therefore, should dismiss Plaintiffs' DJA claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

In pertinent part, 28 U.S.C. § 2201 provides: "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration." A request for declaratory relief, however, does not by itself establish a case or controversy involving an adjudication of rights.[10] *Skelly Oil Co.*, 339 U.S. at 671-72, (1950); *In re Joint E & So. Dist. Asbestos Litig.*, 14 F.3d 726, 731 (2d Cir. 1993). "Therefore, a court may only enter a declaratory judgment in favor of a party who has a substantive claim of right to such relief." *In*

re Asbestos Litig., 14 F.3d at 731. Here, in each of the counts at issue, Plaintiffs articulate their cause of action under the DJA by stating, "Plaintiffs are entitled to an order pursuant to 28 U.S.C. §§ 2201-2202, ..." However, the DJA does not provide an independent cause of action, and thus, Plaintiffs have failed to properly state a claim upon which the Court can grant them relief. *See Skelly Oil Co.*, 339 U.S. at 671-72; *In re Asbestos Litig.*, 14 F.3d at 731. The Court lacks subject matter jurisdiction over these claims and, accordingly, the Court should dismiss the claims Plaintiffs advance in Counts I through VI, VIII, and IX under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

CONCLUSION

For all the foregoing reasons, the Motion to Dismiss should be granted and Plaintiffs' Complaint against Defendants should be dismissed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s/ Loretta S. Harber
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